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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

NO. 231

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

CHICAGO RAILWAY EQUIPMENT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM S. OPPENHEIM,
Solicitor for Respondent.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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STATEMENT.

Petitioner correctly states that the income tax return of respondent for 1918 was filed on June 16, 1919, and that the five-year period of limitation for its assessment expired June 16, 1924. A deficiency notice was mailed to respondent on March 14, 1925, some nine months after the taxes were barred, and from the determination of the Commissioner the respondent filed an appeal with the Board of Tax Appeals on May 6, 1925. On December 7, 1925, petitioner's solicitor sent respondent a letter in which he stated:

> "It appears from the records of this office that you have filed an appeal with the United States Board of Tax Appeals protesting the assessment of additional taxes for the years 1917, 1918 and 1919 and as it is impossible at this time to determine whether the case will be dis-

> posed of by the Board prior to the expiration of the period of your waiver, you are requested to execute in duplicate and to return to this office at once the enclosed waiver forms.
>
> If the waiver forms are not executed and returned to this office immediately, the commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of Section 274 (d) of the Revenue Act of 1924. (R. 96.)

To avoid this threatened jeopardy assessment, respondent signed and forwarded to petitioner a waiver in which it is said:

> "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire," etc.

The record shows that this waiver is not signed by the Commissioner. (R. 97.)

The self-serving declaration of the petitioner's solicitor that a prior waiver had been made by respondent could not refer to a legal waiver in existence at the time the Commissioner mailed his deficiency notice on March 14, 1925. If such a waiver was held by the Commissioner, no further waiver would be required by the provisions of Section 277 (b) of the statute of 1924, by which the period for the assessment of taxes is extended sixty days upon the mailing of deficiency notice, and, if an appeal is filed to the Board of Tax Appeals, until the final decision by the Board.

Before the Board of Tax Appeals the respondent set up the bar of the Statute of Limitations. (R. 34, 36.) Petitioner in his answer made no claim of any waiver other than that of December 10, 1925. (R. 38.)

Commissioner's power to accept waiver.

Section 25 of the Revenue Act of 1921 provided that income taxes for the year 1918 should be determined and assessed within five years after the return was filed "unless both the

commissioner and taxpayer consent in writing to a later determination, assessment and collection of the tax."

Sec. 278 (c) of the Revenue Act of 1924 provides:

> "Where both the Commissioner and Taxpayer have consented in writing to the assessment of the tax after the time prescribed in 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2)" etc.

The object of a waiver is solely to give the Commissioner ample time within which to make his determination and mail his deficiency notice. It seems quite plain that after the determination is made and notice of deficiency mailed, and appeal taken to the Board of Tax Appeals, the Commissioner is without statutory power to exact, under threat of a jeopardy assessment, or even accept, at the solicitation of the taxpayer, a waiver of taxes already barred.

This view is emphasized by the very language of the waiver, which provides that it is to expire on December 31, 1926, unless in the meantime a notice of the deficiency tax is sent by registered mail and then if no appeal is taken, the time for making of the assessment shall be extended sixty days, or if an appeal is filed, then the date shall be extended until the final decision of the Board. No such deficiency notice was mailed. (R. 97.)

Reasons for denying writ.

1. The Statute of Limitations was set up by respondent in its appeal. The only waiver pleaded or introduced in evidence was that of December 10, 1925.

2. The so-called "waiver" is invalid because not signed by the Commissioner.

3. The Commissioner had no authority to consent in writing to the assessment of the tax, as his determination had already been made and an appeal taken to the Board of Tax Appeals when the waiver was filed with him. Sec. 278(e) of the Revenue Act of 1924 contemplates the making of a waiver before the tax is barred and does not empower the Commissioner to enter into such a writing after the expiration of the time for making the assessment.

4. Assuming the waiver to be valid and to authorize a future assessment, then according to its very terms, the right to make such assessment became barred December 31, 1926, because prior to such date no deficiency letter was mailed to the taxpayer.

5. The questions involved in the *Stange, Aiken* and *Brown cases* now pending in this court are not similar to those involved in this suit. In those cases waivers were filed with the Commissioner prior to the time of his making his determination, and, relying thereon, he did not make his determination until after the period of limitation had expired. Here the waiver was not signed by the taxpayer nor demanded by the Commissioner until eighteen months after the taxes were barred, and many months after he had made his determination and mailed his deficiency notice, and after an appeal had been taken to the Board of Tax Appeals.

We respectfully submit that the petition should be denied.

Respectfully submitted,

WILLIAM S. OPPENHEIM,
Solicitor for Respondent.